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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-190

ELI LILLY AND COMPANY,
Petitioner,
v.
ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Brief for the Respondents in Opposition ("government's brief") argues that the Comptroller General's demand for access to all of Lilly's records is supported by not just one but several purposes, at least one of which is germane to the access statutes and clauses. The government's brief argues that if one purpose is germane then it doesn't matter what other purposes the Comptroller General may have.

that an administrative agency can abuse its authority for purposes extraneous to its authorizing statute so long as its action is camouflaged by a proper purpose. In *LaSalle,* the Court simply held that the Internal Revenue Service can issue a summons for the dual purpose of investigating both civil and criminal tax liability, because the "criminal and civil elements are inherently intertwined." 98 S.Ct. at 2363. Here, on the other hand, the Comptroller General is using his access-to-records authority for the purpose of a research study on the entire pharmaceutical industry, which is totally unrelated to the purpose of the access statutes and clauses. Furthermore, in *LaSalle,* the Court carefully noted that the IRS can issue summonses only for the specific purposes contemplated by the statute creating the summons power. 98 S.Ct. at 2367, n. 18. Unlike the Seventh Circuit's holding here that the Comptroller General can use his limited access-to-records authority under government contracts to facilitate *any* of his powers, the Court in *LaSalle* held that the IRS could not issue summonses for purposes extraneous to the statute granting the power. Therefore, the Court did not foreclose inquiry into the institutional motives of the IRS in issuing a summons, for if issued solely for a criminal investigatory purpose, the summons would have been unlawful.

Accordingly, the government's brief mistakenly claims that it is unnecessary to resolve the issue of whether the Comptroller General can use his limited access-to-records authority under the procurement statutes as a tool to serve extraneous purposes. That issue cannot be avoided except by ignoring it. This Court should decide whether the Comptroller General's extraneous purposes can escape judicial review if superficially combined with an alleged proper purpose.

QUESTION 2

The government's brief does not deny that the Seventh Circuit's holding will permit access to virtually *all* of the cost records of *every* private company which enters into a negotiated procurement contract with the federal government, regardless of the nature of the contract involved. Instead, the government's brief argues that an examination of cost records, including indirect cost records, is necessary in order to evaluate the procurement technique used in awarding the contract. (Respondents' Brief, pp. 12-15.) The government, however, commits the same error committed by the Ninth Circuit in *Hewlitt-Packard* v. *United States,* 385 F.2d 1013 (9th Cir. 1967), *cert. denied,* 390 U.S. 988 (1968)—it rewrites the access-to-records statutes. In *Hewlitt-Packard,* the Ninth Circuit held that cost records directly pertain to contracts of the type involved here only because the Court equated the meaning of the statutory term "contract" with the "general subject matter of procurement." 385 F.2d at 1016. Similarly, the government here is in effect stating that the statutes allow access to records which directly pertain to "an evaluation of the negotiated procurement method," rather than just allowing access to records which directly pertain to the "contract." A broad range of materials may be pertinent to an evaluation of the negotiated procurement method but not directly pertinent to the contract itself.

Nevertheless, by the mere device of twisting the definition of a term which otherwise has a commonly understood meaning, the statutory limits on the Comptroller General's access-to-records authority have been removed. That is precisely a second reason why this case requires review by this Court. Congress intended to grant only limited access to private contractors' records by limiting access to

records which "directly pertain" to a contract. However, that intent is being defeated by judicial editing of the statutes, the latest and most extensive version of which is the Seventh Circuit's opinion in this case.

QUESTION 3

The government's brief argues that the Seventh Circuit properly directed the entry of summary judgment for the government because the construction of the access-to-records provisions is a matter of law. (Respondents' Brief, p. 16.) That argument is another example of the government's attempt to convert this case into a simple contract case. Even if the meaning of the access-to-records clauses were a question of law, whether the Comptroller General is abusing his authority in invoking the clauses for extraneous purposes is a question of fact. Lilly has asserted and the government has denied that the Comptroller General is demanding access to Lilly's records for the extraneous purpose of providing cost and profit data to a Senate subcommittee, which in turn intends to expose the data to the public for the sake of exposure. Therefore, the presence of that genuine issue of fact is sufficient in itself to render summary judgment for the government improper.

As for the other remaining factual issue of whether the Comptroller General will exceed the scope of his authority once access to Lilly's records is granted, the government states that such question has no bearing on the propriety of summary judgment because the "Comptroller's access to [Lilly's] records will be limited by the district court's order and by the contractual 'access-to-records' provisions." (Respondents' Brief, p. 16.) If that is true, then why does the Comptroller General state on the record that he cannot identify any records of Lilly which he does *not*

want to examine? The reason is that the Comptroller wants to examine *all* of Lilly's records in order to determine *which* records he has a right to examine. At the very least, that, too, is a factual issue which precludes summary judgment for the government.

CONCLUSION

The government's brief does not deny that the Seventh Circuit's holding in this case will have a devastating effect on the privacy of government contractors' confidential records and an explosive effect upon the Comptroller General's power to intrude into the privacy of American business. Moreover, nothing in the government's brief contravenes the basic fact that this case presents important questions under the federal procurement laws which have not been, but should be, settled by this Court. Therefore, Lilly's petition for certiorari should be granted.

Respectfully submitted,

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